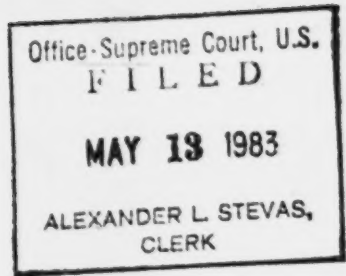


82-1846

No.



IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

RONALD W. ANDREWS, M.D.,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

Petition for Writ of Certiorari to the United States Court
of Appeals for the Third Circuit.

Richard M. Meltzer, Esquire
MALIS, TOLSON & MALIS
Suite 305
Six Penn Center Plaza
Philadelphia, PA 19103
(215) 665-9111
Counsel for Petitioner

QUESTION PRESENTED

1. Was Petitioner deprived of his Fifth and Sixth Amendment Constitutional rights as a result of an indictment charging a physician with a violation of Title 21 United States Code §841(a)(1), but which indictment failed to include the essential allegation that the controlled substances distributed lacked a legitimate medical purpose or were distributed beyond the course of professional practice?

INDEX

	Page
QUESTION PRESENTED	i
OPINIONS OF THE COURT BELOW	2
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	5

Certiorari is essential to prevent grave injustice to the Petitioner as Petitioner was deprived of his Fifth and Sixth Amendment rights under the United States Constitution as the decision of the Third Circuit Court of Appeals is contrary to the decisions of the Fifth Circuit Court of Appeals enunciated in *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981) and the Ninth Circuit Court of Appeals announced in *United States v. Deal*, 587 F.2d 956 (9th Cir. 1978) and is contrary to the policy of the United States Supreme Court as pronounced in *United States v. Moore*, 423 U.S. 122 (1975), which all provide that an essential element of the offense charging a physician with a violation of 21 U.S.C. 841(a)(1) is that the prescription was dispensed or distributed without a legitimate medical reason.

CONCLUSION	8
APPENDIX A — Statutes Involved	A-1
APPENDIX B — Final Judgment of Eastern District of Pennsylvania	A-2
APPENDIX C — Court of Appeals Judgment Order	A-4
APPENDIX D — Court of Appeals Petition for Rehearing En Banc	A-6

TABLE OF CASES CITED

	Page
<i>United States v. Deal</i> , 587 F.2d 956 (9th Cir. 1978)	5, 7
<i>United States v. Moore</i> , 423 U.S. 122 (1975)	5, 6, 7
<i>United States v. Outler</i> , 659 F.2d 1306 (5th Cir. 1981)	5
<i>United States v. Roy</i> , 576 F.2d 386 (7th Cir. 1978)	7
<i>United States v. Seelig</i> , 622 F.2d 207 (6th Cir.), cert. denied 449 U.S. 869 (1980)	7

STATUTES CITED

	Page
21 U.S.C. §841(a)(1)	i, 2, 3, 5, 6
28 U.S.C. §1254(1)	2

No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

RONALD W. ANDREWS, M.D.,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

**PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

To The Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Petitioner, Ronald W. Andrews, respectfully prays
that a Writ of Certiorari issue to review the Judgment
Order of the United States Court of Appeals for the Third
Circuit, entered in the above case on March 14, 1983,
affirming the Order of the United States District Court
for the Eastern District of Pennsylvania in favor of Re-
spondent, United States of America, and against Peti-
tioner, Ronald W. Andrews.

OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit entered a Judgment Order on March 14, 1983 affirming the Judgment of conviction and sentence of the United States District Court for the Eastern District of Pennsylvania of July 1, 1982. The United States Court of Appeals for the Third Circuit thereafter entered an Order denying Petitioner's Petition for Rehearing on April 7, 1983.

No specific reasons were given for either the decision of March 14, 1983 or April 7, 1983.

JURISDICTION

The Judgment Order of the Court of Appeals for the Third Circuit affirming the Judgment of the United States District Court for the Eastern District of Pennsylvania was entered on March 14, 1983 and is printed, *infra* (Appendix C, p.A-4). The Order of the United States Court of Appeals for the Third Circuit denying Petition for Rehearing was entered on April 7, 1983 and is printed, *infra* (Appendix D, p. A-6). The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

STATUTES INVOLVED

The specific statutory provision involved is Title 21 United States Code §841(a)(1) and is printed, *infra*, Appendix A, p. A-1.

STATEMENT OF THE CASE

On April 6, 1982, petitioner, Ronald W. Andrews, M.D., was indicted in the Eastern District of Pennsylvania in a 31 count superseding indictment charging him with violations of Title 21 United States Code, Section 841(a)(1).

Except for the dates, quantity, and description of the prescription for the controlled substance, each count contained the same allegation. A sample of a count in the indictment is contained below:

"That on or about August 14, 1980, at Philadelphia, in the Eastern District of Pennsylvania,

RONALD W. ANDREWS

knowingly and intentionally did unlawfully dispense and distribute 50 tablets of Seconal, containing secobarbital, a Schedule II non-narcotic controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1).

Title 21 U.S.C. §841(a)(1) provides, in part:

(a) "Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally, (1) to manufacture, distribute, or dispense or possess with intent to manufacture, distribute or dispense a controlled substance. . . ."

Following a jury trial on May 10, 1982, petitioner was convicted on 9 of the 31 counts and was sentenced to imprisonment for a term of three (3) years, a special parole term of two (2) years, and probation of three (3) years.

The Government's evidence was presented through the testimony of two (2) undercover agents and the Government's expert medical witness, Dr. George Woody. The two undercover agents presented evidence concerning their conversations with the petitioner in his medical

office including the medical treatment, history, and advice given by the petitioner.

In regard to the testimony of Dr. George Woody, the Government for the first time presented an offer of proof that it was necessary to prove that the conduct of the petitioner was outside the course of his professional practice. Dr. Woody then testified to procedures normally conducted in the usual course of a professional medical practice before prescribing drugs, reasons for prescribing certain drugs, and expressed an opinion as to the usual course of medical practice concerning the prescriptions with which the petitioner was charged with dispensing and distributing in violation of the law.

During his charge to the jury, the trial judge instructed the jury that an essential element of the offense was that the Government was required to prove the actions of the petitioner were outside the scope of his professional practice and that the prescriptions were distributed or dispensed other than for a legitimate medical purpose.

Following the petitioner's sentence, he timely filed an appeal to the Third Circuit Court of Appeals with new counsel, which appeal was denied on March 14, 1983. Petitioner filed a petition for rehearing which was denied on April 7, 1983.

The issue presented by this petition concerns whether petitioner's Constitutional rights were violated because the indictment failed to allege that the prescriptions were dispensed with a lack of a legitimate medical purpose, which is an essential element of the offense. Since there were no pre-trial motions filed to dismiss the indictment for lack of sufficiency, there is no evidence that either the petitioner or his original counsel would have been aware that the Government had to prove this essential element.

Petitioner was deprived of his Fifth and Sixth Amendment Constitutional rights as a result of an in-

dictment charging a physician with a violation of Title 21 United States Code §841(a)(1), but which indictment failed to include an essential allegation that the prescriptions dispensed or distributed lacked a legitimate medical purpose or were done so beyond the course of professional practice.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

CERTIORARI IS ESSENTIAL TO PREVENT GRAVE INJUSTICE TO THE PETITIONER AS PETITIONER WAS DEPRIVED OF HIS FIFTH AND SIXTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION AS THE DECISION OF THE THIRD CIRCUIT COURT OF APPEALS IS CONTRARY TO THE DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS ENUNCIATED IN *UNITED STATES v. OUTLER*, 659 F.2d 1306 (5th Cir. 1981) AND THE NINTH CIRCUIT COURT OF APPEALS ANNOUNCED IN *UNITED STATES v. DEAL*, 587 F.2d 956 (9th Cir. 1978) AND IS CONTRARY TO THE POLICY OF THE UNITED STATES SUPREME COURT AS PRONOUNCED IN *UNITED STATES v. MOORE*, 423 U.S. 122 (1975), WHICH ALL PROVIDE THAT AN ESSENTIAL ELEMENT OF THE OFFENSE CHARGING A PHYSICIAN WITH A VIOLATION OF 21 U.S.C. 841(a)(1) IS THAT THE PRESCRIPTION WAS DISPENSED OR DISTRIBUTED WITHOUT A LEGITIMATE MEDICAL REASON.

In the case of the *United States v. Outler*, 659 F.2d 1306 (5th Cir. 1981), this same issue was raised before the Fifth Circuit Court of Appeals. In that case the defendant physician was indicted for the same violation as in this case and the issue presented was "whether a grand jury indictment which charges a physician with prescribing drugs in violation of 21 U.S.C., 841(a)(1)

must allege that the prescription lacked a legitimate medical reason? . . . For the following reason, we believe that the lack of a legitimate medical reason is an essential element of this offense and, therefore, must be alleged in the indictment." p. 1309

The Court states:

"This Court, however, repeatedly has held since *Moore* that it is incumbent upon the government to prove the lack of a legitimate medical reason in order to convict a registered physician of dispensing drugs in violation of 21 U.S.C. §841(a). [citations omitted] We now conclude that this element is essential to a charge of the offense. We recognize that an element is not always an 'essential element' simply because the prosecution carries the burden of proof; however, here the element embodies the culpability of the offense. Without behavior beyond professional practice, there is no crime. We believe, therefore, that the lack of a legitimate medical reason is as essential to the offense charged against Dr. Outler as the requisite *Mens rea*." (p.1310)

This decision was also premised upon the conclusion that the defendant's Fifth and Sixth Amendment rights were violated. The defendant's Fifth Amendment right guaranteeing the right to a proper grand jury indictment was violated since one could only speculate whether or not the grand jury was able to properly determine probable cause without this essential element. The Fifth Circuit did not believe that the defendant's Sixth Amendment rights were violated to the extent he had been unable to prepare a full defense to avoid surprise at trial, since his counsel had moved to dismiss the pertinent counts of the indictment for failure to contain this essential allegation. This distinction is critical since Petitioner never raised this motion and may not have been

aware of this essential element until trial. The Government should not be permitted to exploit its patently defective indictment by any contention of waiver.

The Ninth Circuit Court of Appeals also confronted this issue in *U.S. v. Deal*, 587 F.2d 956 (9th Cir. 1978). In that case, the indictment failed to charge an essential element of the offense i.e., lack of authorization to dispense. The court reversed the physician's conviction by holding that "lack of authorization to distribute or dispense controlled substances is an element of the crime. . . . The most liberal reading of the indictment does not reflect an allegation that Deal acted outside of the scope of the medical exception." p. 963.

These decisions are in apparent conflict with some other Circuits which have confronted this issue. In *U.S. v. Roy*, 576 F.2d 386 (7th Cir. 1978) the Seventh Circuit has ruled that the lack of a legitimate medical purpose is not an essential element of the offense stated in §841(a) (1). This decision appears to be no more than dicta. See also *U.S. v. Seelig*, 622 F.2d 207 (6th Cir.), cert. denied 449 U.S. 869 (1980).

It is essential that this issue be decided by this Court to obtain uniformity of indictments in all Circuits when a physician is charged with this offense. This Court should also consider the issue for clarification as to the application of its ruling in *U.S. v. Moore*, 423 U.S. 122 (1975) to the sufficiency of an indictment.

One should not be burdened with uncertainty of the essential elements of the offense to be presented against a defendant like petitioner, a professional practitioner. Speculation as to the adequacy of his preparation of a defense or to the initial decision of the grand jury in returning a defective indictment must not be permitted and countenanced. All future indictments must be uniform in charges of this nature and only this Court is able to demand such uniformity so that future defendants in a position as that of Petitioner herein can be adequately and fully protected in defending such charges.

CONCLUSION

Petitioner's conviction resulted from an indictment which failed to contain an essential element of the offense. The element strikes at the core of the prosecution's case against the Petitioner, a physician charged with unlawfully dispensing or distributing controlled substances. The allegation that the physician's conduct occurred without a legitimate medical reason is required in some, but not all Circuits. Uniformity is essential to protect all similar defendants. Accordingly, Certiorari should be granted, and the conviction below reversed.

Respectfully submitted,

Richard M. Meltzer, Esquire
Counsel for Petitioner

APPENDIX A

Title 21 U.S.C. 841(a) (1). Prohibited acts A.

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or . . .

A-2

EASTERN DISTRICT OF PENNSYLVANIA

DEFENDANT

RONALD W. ANDREWS

APPENDIX B

DOCKET NO.

CR. 81-00353

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (6/79)

In the presence of the attorney for the government
the defendant appeared in person on this date Terri Marinari, Esq.

MONTH	DAY	YEAR
June	30,	1982

COUNSEL

☐ WITHOUT COUNSEL

However the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSELRichard M. Meltzer, Esq.

(Name of counsel)

PLEA

☐ GUILTY, and the court being satisfied that
there is a factual basis for the plea,☐ NOLO CONTENDERE,☐ NOT GUILTYFINDING &
JUDGMENT

There being a finding/verdict of

☐ NOT GUILTY. Defendant is discharged☒ GUILTY.Defendant has been convicted as charged of the offense(s) of Dispensing of controlled substances,
in violation of Title 21, United States Code, Section 841(a)(1)SENTENCE
OR
PROBATION
ORDER

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS/ on Count 16.

In addition, there is a special parole term of TWO (2) YEARS imposed on Count 16. On Count 20, the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS, said sentence shall run concurrently with sentence imposed on Count 16.

SPECIAL
CONDITIONS
OF
PROBATION

On Count 21, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of imprisonment and upon termination of the special parole term.

ADDITIONAL
CONDITIONS
OF
PROBATION

On Count 22, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

COMMITMENT
RECOMMEN-
DATION

The court orders commitment to the custody of the Attorney General and recommends,

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

SIGNED BY

☒ U.S. District Judge☐ U.S. MagistrateDonald W. VanArtsdalen

Donald W. VanArtsdalen

Date June 30, 1982

CERTIFIED AS A TRUE COPY ON

THIS DATE July 1, 1982Marqueta McCaffrey

() CLERK

(X) DEPUTY

of imprisonment and upon termination of the special parole term, said sentence shall run concurrently with sentence imposed on Count 21.

On Count 23, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to begin and commence at the termination of any and all sentences of imprisonment and upon termination of the special parole term, said sentence to run concurrently with sentence imposed on Count 21.

On Count 25, defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS, said sentence to run concurrently with sentence imposed on Count 16.

On Count 26, imposition of sentence as to imprisonment only is suspended and the defendant is placed on probation for a period of THREE (3) YEARS to run concurrently with term of probation on Count 21; said term of probation to commence on the termination of any and all sentences of imprisonment and the term of any special parole.

On Count 27, defendant is committed to the custody of the Attorney General for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS to run concurrently with sentence on Count 16.

On Count 28, defendant is committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of THREE (3) YEARS and in addition, there is imposed a special parole term of TWO (2) YEARS to run concurrently with sentence on Count 16.

A-4

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 82-1407

UNITED STATES OF AMERICA

v.

RONALD W. ANDREWS,

Appellant

(Criminal No. 81-00353-01 - E.D.Pa.)

District Judge: Honorable Donald W. VanArtsdalen

Submitted Under Third Circuit Rule 12(6)
March 9, 1983

BEFORE: SEITZ, *Chief Judge*, HIGGINBOTHAM and
SLOVITER, *Circuit Judges*.

JUDGMENT ORDER

After consideration of the contention raised by appellant, to-wit, that an indictment charging a physician with prescribing drugs in violation of Title 21 U.S.C. §841(a)(1) is insufficient if it fails to allege the drugs were dispensed with a lack of legitimate medical purpose or outside the course of his professional practice, it is

A-5

ADJUDGED AND ORDERED that the judgment of
the district court be and is hereby affirmed.

By the Court,

Chief Judge

ATTEST:

Chief Deputy Clerk

DATED: March 14, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1407

UNITED STATES OF AMERICA

v.

RONALD W. ANDREWS,

Appellant

(Criminal No. 81-00353-01 - E.D.Pa.)

District Judge: Honorable Donald W. VanArtsdalen

SUR PETITION FOR REHEARING

PRESENT: SEITZ, *Chief Judge*, ADAMS, GIBBONS,
HUNTER, WEIS, HIGGINBOTHAM,
SLOVITER, BECKER, *Circuit Judges*.

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

Collins J. Seitz
Chief Judge

DATED: April 7, 1983